REPORT FOR THE HEARING

in Case E-15/12

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Hæstiréttur Íslands (the Supreme Court of Iceland), in the case between

Jan Anfinn Wahl

and

the Icelandic State

concerning the interpretation of Article 27 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

I Introduction

1. By a letter of 5 December 2012, registered at the EFTA Court on 17 December 2012, the Hæstiréttur Íslands (the Supreme Court of Iceland) made a request for an Advisory Opinion in a case pending before it between Jan Anfinn Wahl (hereinafter "Plaintiff") and the Icelandic State (hereinafter "Defendant").

2. The Plaintiff, a Norwegian national and member of the association *Hell's Angels*, was denied entry into Iceland. The subsequent administrative appeal of the Plaintiff was rejected on the grounds that, in light of the alleged activities of the said association and its links to organised crime, individuals belonging to that association were considered to constitute a real threat to public policy and public security in Iceland. The public policy in question consisted in preventing the members of the association from coming to Iceland.

3. This case raises the question whether under EEA law national authorities are lawfully able to consider that a citizen of an EEA State constitutes a threat to public policy or public security by the mere fact of being a member of an organisation that is considered to maintain links to criminal activities, but membership of which is not outlawed by the State in question. Furthermore, the question is raised whether a provision of criminal law defining as punishable the act of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation, represents a fundamental interest of society or whether such provision is to be considered a measure of general prevention. In addition, the question is raised whether the EEA State is required to adduce a certain probability that the individual against whom the measure is taken intends to partake in certain actions such that his conduct may be considered to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

4. The dispute before the national court arose because of uncertainties concerning the interpretation of the relevant provisions of national law and the limitations on the discretionary powers of national authorities resulting from the EEA Agreement.

II Legal background

EEA law

5. Article 7 EEA reads as follows:

> *Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*
>
> *a. an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;*
>
> *b. an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

Directive 2004/38/EC[1]

6. Directive 2004/38/EC was incorporated into Annex V to the EEA Agreement at point 1 and Annex VIII at point 3.[2]

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[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 157 (corrected in OJ 2004 L 229, p. 35).

[2] Inserted by Decision of the EEA Joint Committee No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, p. 17). Entered into force on 1 March 2009.

7. Article 27 of the Directive reads as follows:

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

8. Article 31 of the Directive reads as follows:

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

- *where the expulsion decision is based on a previous judicial decision; or*
- *where the persons concerned have had previous access to judicial review; or*
- *where the expulsion decision is based on imperative grounds of public security under Article 28(3).*

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

9. Article 37 of the Directive reads as follows:

> *The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.*

Decision of the EEA Joint Committee No 158/2007[3]

10. Recital 8 in the preamble to the Decision reads as follows:

> *The concept of "Union Citizenship" is not included in the Agreement.*

11. Article 1 of the Decision reads as follows:

> *Annex VIII to the Agreement shall be amended as follows:*
>
> *1)* ….
> …
> *The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:*
>
> *a.* …
> *b.* …
> *c.* *The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States".*

12. Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement reads as follows:

> *The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.*

National law[4]

13. Article 22 of the Foreign Nationals Act No 96/2002 reads as follows:

> *A commissioner of police shall decide on denial of entry as provided for in Article 18, the first paragraph, subparagraphs (a) – (i). The Immigration Office shall take other decisions in accordance with this Article. Police shall prepare the cases to be decided on*

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[3] Ibid.

[4] Translations of national provisions are unofficial and based on those contained in the documents of the case.

by the Immigration Office. If the police consider that the conditions for denial of entry or expulsion are fulfilled, they shall send the case file to the Immigration Office for its decision.

14. Article 41 of the Foreign Nationals Act, which implements Article 27 of the Directive, reads as follows:

An EEA or EFTA foreign national may be refused the right to enter Iceland on arrival in the country or for up to seven days after arrival if:

a. …
b. …
c. *he conducts himself in a way referred to in the first paragraph of Article 42, or*
d. *this is necessary in view of the security of the state, urgent national interests or public health.*

A police commissioner shall take the decision on refusal of entry under items a and b of the first paragraph; the Directorate of Immigration shall take decisions under items c and d. It shall be sufficient that the processing of the case begin[s] before the end of the seven-day period.

If the processing of a case under the first paragraph does not begin within seven days, the EEA or EFTA foreign national may be expelled from Iceland by a decision of the Directorate of Immigration in accordance with items b, c and d within three months of his arrival in Iceland.

15. Article 42 of the Foreign Nationals Act provides as follows:

(1) An EEA or EFTA foreign national, or a member of his family, may be expelled from Iceland if this is necessary in view of public order or public safety.

(2) Expulsion under the first paragraph of this Article may be effected if the foreign national exhibits conduct, or may be considered likely to engage in conduct, that involves a substantial and sufficiently serious threat to the fundamental attitudes of society. If the foreign national has been sentenced to punishment or special measures have been decided, then an expulsion on these grounds may only be effected if the conduct involved may indicate that the foreign national will again commit a criminal action.

16. The Directive was further implemented by Article 87 of Regulation No 53/2003, which reads as follows:

An EEA or EFTA foreigner may be denied entry or expelled if necessary with a view to public order and public safety, cf. Section 42, the first paragraph (c), and Section 43, the first paragraph, of the Foreign Nationals Act.

Denial of entry or expulsion as provided for in the first paragraph is, for example, allowed if a foreigner:

a. is dependent upon drugs of abuse or other illicit substances, and has become thus dependent before his first permit to stay was issued, or

b. suffers from a serious psychiatric disturbance, or a psychiatric disturbance characterised by agitation, delirium, hallucinations or thought disorders, provided this condition developed before his first permit to stay was issued.

A decision on denial of entry or expulsion by reference to public order or public safety shall be exclusively based on the personal conduct of the foreigner in question, and may only be carried out if measures are allowed with respect to Icelandic nationals in comparable situations.

17. Article 175 a of the General Penal Code No 19/1940 as inserted by Article 5 of Act No 149/2009, provides as follows:

Any person who connives with another person on the commission of an act which is punishable by at least 4 years' imprisonment, the commission of which is part of the activities of a criminal organisation, shall be imprisoned for up to 4 years unless a heavier punishment for his offence is prescribed in other provisions of this Act or in other statutes.

'Criminal organisation' here refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act that is punishable by at least 4 years' imprisonment, or a substantial part of the activities of which involves the commission of such an act.

18. Article 10 of the Administrative Procedure Act No 37/1993 reads as follows:

An authority shall ensure that a case is sufficiently investigated before a decision hereon is reached.

19. Article 12 of the Administrative Procedure Act provides as follows:

A public authority shall reach an adverse decision only when the lawful purpose sought cannot be attained by any less stringent means. Care should then be taken not to go further than necessary.

III Facts and procedure

20. By a letter of 5 December 2012, registered at the EFTA Court on 17 December 2012, the Supreme Court of Iceland made a request for an Advisory Opinion in a case pending before it between Jan Anfinn Wahl and the Icelandic State.

21. On 5 February 2010, the Plaintiff, having arrived in Iceland by air, was stopped by a customs officer and his luggage was searched. Items marked with the name of the motorcycle club *Hell's Angels* were found.

22. The Plaintiff was held at the airport while he was asked to provide statements about his background and the purpose of his visit to Iceland. He stated that he was a member of the Hell's Angels motorcycle club in Drammen, Norway, and held a clean criminal record. He indicated that the purpose of his visit was to go sightseeing and engage in social contact with befriended members of an Icelandic motorcycle club – Fáfnir (subsequently renamed MC Iceland). He also said that he had a return flight to Oslo booked for 8 February 2010. He was subsequently denied entry to Iceland by a decision of the Directorate of Immigration which was served to him on the same day. It appears that a paper had been enclosed, initialled by the Plaintiff and two policemen, in which it was stated that nationals of EEA States could be denied entry into Iceland on grounds of public policy and public security.

23. The Plaintiff filed an administrative appeal against this decision of the Directorate of Immigration with the Ministry of the Interior. He stated, *inter alia*, that he was a 36-year old university student from Norway and a member of a motorcycle club with lawful objectives. The motorcycle clubs he belonged to had never broken the law, neither in Iceland nor in his home country, and pursued lawful purposes.

24. The Plaintiff and the Directorate of Immigration submitted observations to the Ministry of the Interior. The Directorate of Immigration revealed that it received a request by the Commissioner of Suðurnes Police on the day of the Plaintiff's arrival requesting a decision on a denial of entry to the country pursuant to item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002. The request was accompanied by an "Open danger assessment by the Intelligence Department of the Office of the National Commissioner of Police regarding the arrival of a member of *Hell's Angels* in Iceland, dated 5 February 2010." This assessment stated that it was likely that the arrival of the Plaintiff was connected to the planned entry of the said Icelandic motorcycle club into the *Hell's Angels*. The admission process had been directed from Norway. Following completion of that entry, the Icelandic group would acquire the status of a full and independent division within *Hell's Angels*. The assessment further stated that everywhere that this association had established itself, an increase in organised crime had followed.

25. MC Iceland acquired full membership of the *Hell's Angels* MC on 4 March 2011. The proposal by the Norwegian chapter of *Hell's Angels* was accepted in February 2011 at the "European Officers Meeting" in Manchester, England.

26. On 16 June 2010, the Ministry of the Interior gave reasons for the decision at issue in this case and rejected the appeal. It stated that the decision had been taken on grounds

of item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002, as amended by the Act No 86/2008. The Ministry considered that this provision in conjunction with the first paragraph of Article 42, laying down the circumstances in which it is permissible to refuse EEA or EFTA foreign nationals entry into Iceland, were the correct legal basis for the decision. That legislation was based on Iceland's obligations under the EEA Agreement and Directive 2004/38.

27. The Ministry of the Interior stated that under the EEA Agreement and Directive 2004/38 it is permissible to refuse an EEA national entry into Iceland if he is a member of a society or association which threatens public policy or public security and that it is not necessary for the society or organisation to be prohibited. It explained that its assessment had taken due account of the case law of the Court of Justice of the European Union and was supported further by a communication from the European Commission to the European Parliament and Council of Ministers of the European Union of 2 July 2009.

28. The Ministry also argued that, when interpreting and applying rules on public order, the authorities have discretion to define their own needs in further detail and to define when circumstances are such as to require a restriction of the freedom of movement in order to protect such interests. It stressed all the same that this assessment had to be based on relevant considerations and take account of Iceland's obligations under the EEA Agreement.

29. The Ministry indicated that "organised criminal associations" such as *Hell's Angels* were viewed as a growing threat to the community and that the national police commissioners of the Nordic countries had formulated a policy to fight such activities. Since 2002 the National Commissioner of the Icelandic Police had instructed local police commissioners to implement this policy as a result of which foreign members of *Hell's Angels* had been repeatedly denied entry on arrival to Iceland by reference to public policy and public security.

30. The Ministry concurred with the view that, in light of the activities and the nature of *Hell's Angels*, individuals belonging to that association constituted a real threat to public order and public security in Iceland. The arrival of members of the association in Iceland was intended to open the way for full membership of MC Iceland. In the view of the Ministry, such membership would strengthen the influence of the association in Iceland and the spread of organised crime.

31. The Ministry considered that it had been sufficiently demonstrated that the Plaintiff's visit was connected to the membership of MC Iceland in the association of *Hell's Angels*. His membership demonstrated that he had aligned himself with the association's aims, intentions and those activities of the association which were regarded as threatening to public order and public security. Thus, according to the Ministry, it was as a result of the Plaintiff's own personal conduct that he had been expelled from Iceland

on 5 February 2010. His arrival in Iceland constituted a serious and real threat to the community's fundamental interest in ensuring public policy and public security.

32. The Plaintiff's action before the district court, claiming compensation for non-financial damage and compensation for financial loss, was rejected, with the denial of entry considered to comply with the requirements of administrative law.

33. The Plaintiff then lodged an appeal with the Supreme Court now seeking compensation simply for alleged false imprisonment and the resulting damage to his reputation. The Plaintiff bases his claim on the view that the Directorate of Immigration's decision was unlawful. He contends that the danger assessment contained unsubstantiated allegations and pertained to the organisation as a whole, whereas his personal conduct was lawful and extended only to membership of the organisation and owning its uniform. Furthermore, he alleged that the basis for the assertions of the Directorate was never investigated by the Ministry.

34. The Defendant stated that the visits by foreign members were intended to further the full membership of the local motorcycle club in the association, which would strengthen its influence and contribute to organised crime. In its view, it had been sufficiently demonstrated that the visit of the Plaintiff was connected to the intended membership of the club in this association. Furthermore, as a result of his membership, the Plaintiff had demonstrated his alignment with the association's aims, intentions and activities. The latter were considered to constitute a threat to public policy and public security. It was this personal conduct which led to the denial of entry, the conditions of the relevant national provision having been met. In addition to the assessment, a police report was part of the basis for the decision. However, further details could not be divulged.

35. Membership of a motorcycle club such as *Hell's Angels* is not unlawful as such, and the activities of such associations have not been prohibited in Iceland. At the same time, Article 175 a of the General Penal Code makes it a punishable offence to connive with another person in the commission of certain acts which form part of the activities of a criminal association.

36. As the Supreme Court considers the Icelandic provisions for a refusal of entry inconsistent in that, on the one hand, they permit authorities to deny entry if this proves necessary in view of public policy or public security concerns, but, at the same time, prescribe that EEA and EFTA nationals can only be denied entry if it is possible to take measures against an Icelandic citizen under comparable circumstances, it decided to stay the proceedings to make a reference to the EFTA Court under Article 34 SCA on the interpretation of certain rules of EEA law on which the relevant national provisions are based.

37. At the oral hearing on 5 November 2012, the Supreme Court requested legal counsel of each party to indicate their views on whether there was reason to make a reference to the EFTA Court. Neither party objected to the application.

IV Questions referred

38. The Supreme Court of Iceland decided to make a reference to the Court on 17 December 2012 and posed the following questions:

1. **Do Member States which are parties to the Agreement on the European Economic Area have, with regard to Article 7 of the Agreement, the choice of form and method of implementation when making the provisions of Directive 2004/38/EC of the European Parliament and of the Council, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, part of their internal legal order?**

2. **Should paragraph 1 of Article 27 of Directive 2004/38/EC be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA Member State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs, is connected with organised crime and the assessment is based on the view that where such organisations have managed to establish themselves, increased and organised crime has followed, is sufficient to consider a citizen of the Union to constitute a threat to public policy and public security in the state in question?**

3. **For answering the second question, is it of significance whether the Member State has outlawed the organisation of which the individual in question is a member and membership of such organisation is prohibited in the state?**

4. **Is it sufficient grounds for considering public policy and public security to be threatened in the sense of paragraph 1 of Article 27 of Directive 2004/38/EC that a EEA Member State, party to the Agreement on the European Economic Area, has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, or is such legislation considered as general prevention in the sense of paragraph 2 of Article 27 of the Directive? This question is based on the fact that 'organised crime' in the sense of domestic law refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a**

criminal act, or when a substantial part of the activities involves the commission of such an act.

5. **Should paragraph 2 of Article 27 of Directive 2004/38/EC be understood meaning that a premise for the application of measures under paragraph 1 of Article 27 of the Directive against a specific individual is that the Member State must adduce a probability that the individual in question intends to indulge in activities comprising a certain action or actions, or refraining from a certain action or actions, in order for the individual's conduct to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society?**

V Written observations

39. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

– the Plaintiff, represented by Oddgeir Einarsson, Supreme Court Attorney;

– the Defendant, represented by Óskar Thorarensen, Supreme Court Attorney, Office of the Attorney General, acting as Agent;

– the Norwegian Government, represented by Pål Wennerås, advocate, the Attorney General of Civil Affairs, and Janne Tysnes Kaasin, senior advisor, Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority (hereinafter "ESA"), represented by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir and Catherine Howdle, Officers, of the Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission (hereinafter "Commission"), represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents.

VI Summary of the arguments submitted

The Plaintiff

40. The Plaintiff considers that the provisions regarding the exceptions to the right of free movement in the EEA must be interpreted narrowly, as the right constitutes an important pillar of the EU and the EEA. Therefore, parties to the EEA cannot decide unilaterally on the interpretation of the exceptions provided on grounds of public security

and public policy. The Plaintiff refers to the case law of the Court of Justice of the European Union (hereinafter "ECJ") stating that "particularly restrictive interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union."[5] The Plaintiff refers to recital 22 in the preamble to the Directive which states that "[t]he Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC … ." The Plaintiff contends that the provisions of the Directive reduce the authority of EEA States to limit free movement and the discretion they have in interpreting the possibilities for such limitations.

The first question

41. The Plaintiff submits that it follows from Article 7 EEA that Contracting Parties have the choice of form and method of implementation when transposing a directive. However, this implementation authority is limited by Article 37 of the Directive. It follows from this provision that legislation based on the discretion of the Member State must be in favour of the Plaintiff. Furthermore, when several possibilities of interpretation exist, this provision entails that the one most favourable to the persons covered by the Directive must be chosen.

42. The Plaintiff submits, therefore, that the first question should be answered as follows:

> *Contracting Parties have, with regard to Article 7 EEA, the choice of form and method of implementation when making the provisions of Directive 2004/38/EC part of their internal legal order. However, provisions of the Directive shall not affect any laws, regulations or administrative provisions laid down by a State which would be more favourable to the persons covered by the Directive. Therefore, legislation based on the discretion of the State must be in favour of the Plaintiff. In addition, the Directive shall be interpreted in favour of the persons covered by it.*

The second question

43. The Plaintiff considers that entry can only be denied under Article 27 of the Directive if the person concerned has engaged in conduct that is considered to be a threat to public policy and public security within the meaning of Article 27(2). Consequently, this excludes other rules or practices enacted by authorities on the denial of entry.[6] The

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[5] Reference is made to Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257.

[6] Reference is made to Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 59.

Plaintiff contends that the membership of an organisation, regardless of its characteristics, can never by itself lead to a member of such organisation being considered a threat to public policy and public security if a general rule or practice taking action against all individuals who are members of such an organisation is in effect without examining the personal conduct of the individual in question.

44. The Plaintiff submits that, in order for membership in an organisation to be considered personal conduct within the meaning of Article 27 of the Directive, a certain level of participation going beyond simple membership must be present. Only members in positions of leadership and active participants in the activities considered to constitute a threat to public policy and public security can be regarded as being associated with the organisation. The Plaintiff argues that it is not permissible to conclude without individual assessment on a case-by-case basis whether members identify with the characteristics or activities in question. In this regard, the Plaintiff refers to the Norwegian implementation of the Directive, which he contends does not provide for a denial of entry based solely on membership of an organisation believed to be engaging in criminal activities.

45. The Plaintiff refers to the judgment in *Van Duyn*[7] to support the view that membership of an organisation, regardless of the position authorities have towards it and regardless of the manner of participation of an individual in its activities, can never lead to an individual being considered a threat to public security and public policy unless administrative measures have been taken against the organisation and the standpoint of the government regarding this organisation defined. The Plaintiff submits that it must be, at the very least, foreseeable to a person entering the country that he could be denied entry to the country on the grounds of his membership of an organisation. This could entail public announcements and the enactment of specific rules. In addition, the Plaintiff contends that the conditions for considering membership in an organisation a threat to public policy and security have become more restrictive since the judgment in *Van Duyn* was handed down.

46. Furthermore, the Plaintiff submits, in the alternative, that if membership in an organisation were considered to demonstrate a threat posed by an individual to public policy and security, the national authorities must discharge the burden of showing that an organisation is in fact connected to organised crime. They must demonstrate that where such organisations have managed to establish themselves crime has increased. The mere fact that national authorities assume this on the basis of a danger assessment, cannot, as such, suffice. Were the question to be answered in the affirmative, the right to free movement would be deprived of its effectiveness as restrictions could be justified by mere assertions, lacking foundation or materially wrong, without the possibility for the parties concerned to comment.

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[7] Reference is made to Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

47. The Plaintiff contends that the criterion of a connection of an organisation to organised crime is too broad and elastic such as to serve as the basis for a refusal of entry. In addition, the correlation between the establishment of an organisation and an increase in organised crime does not imply a causal link between the two, as the latter can be the result of unrelated factors. Even if a causal link were to be established, this would not suffice by itself to conclude that an individual's membership in such organisation constitutes a contributing factor. The Plaintiff submits that this would only be the case if the member contributed to the establishment, for example by having a role in its organisation.

48. The Plaintiff submits that the second question must be answered as follows:

> *Article 27(1) of Directive 2004/38/EC cannot be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs, is connected with organised crime and the assessment is based on the view that where such organisations have managed to establish themselves, increased and organised crime has followed, is sufficient to consider that a citizen of another EEA State constitutes a threat to public policy and public security in the state in question.*

The third question

49. The Plaintiff submits that the finding in *Van Duyn* on this point was based on international law which precluded a State from refusing the right of entry or residence to its own nationals. He asserts that, according to recent case law, it is not permissible to discriminate between nationals and EEA citizens who carry out the same conduct and, thus, the reasoning in *Van Duyn* on this point can no longer be considered relevant. Therefore, in accordance with the provisions of Council Directive 64/221/EEC, entry could not – and by parity of reasoning, cannot – be denied or an individual expelled if equivalent conduct on the part of citizens of that state is not subject to repressive measures or other genuine and effective measures intended to combat such conduct.[8] The Plaintiff submits that "conduct which a Member State accepts on the part of its own nationals cannot be regarded as constituting a genuine threat to public order".[9] Furthermore, it has been established that the government of an EEA State cannot hinder the movement of a party within its territory on the grounds of his political opinion if nationals of that EEA State are not hindered in moving within the country.[10] The Plaintiff

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[8] Reference is made to Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* v *Belgium* [1982] ECR 1665, paragraph 9.

[9] Reference is made to Case C-268/99 *Jany and Others* v *Staatssecretaris van Justitie* [2001] ECR I-8615, paragraph 61.

[10] Reference is made to Case 36/75 *Roland Rutili* v *Ministre de l'intérieur* [1975] ECR 1219, paragraph 53.

contends therefore that, in order to invoke Article 27 of the Directive, Iceland would need to declare the operations of an organisation as well as membership thereof illegal. If no such action is taken, an individual cannot be considered a threat to public policy and public security. The Plaintiff submits further, in the alternative, that should a *prohibition* of an organisation in the Member State not be required and, hence the third question answered in the negative, it remains the case that the second question must be answered in the negative, as *some* action against individuals residing in the EEA State concerned and in a comparable position to the Plaintiff must be taken.

50. The Plaintiff proposes that the third question be answered as follows:

> *It is of significance whether the EEA State has outlawed the organisation of which the individual in question is a member and membership of such an organisation is prohibited.*

The fourth question

51. The Plaintiff submits that the provision of the Icelandic Penal Code was enacted to fulfil Iceland's obligation to implement the United Nations Convention against Transnational Organized Crime of 2000 and is not connected to rules of national law on the refusal of entry on grounds of public policy and public security. Consequently, it is not foreseeable to an individual concerned that he could be denied entry into the State on the grounds of his membership of an organisation. The Plaintiff notes that the provision does not make it illegal to establish a criminal organisation, but increases the mandatory sentence. As the provision does not pertain to the conduct of the Plaintiff, it cannot be relevant in deciding whether the requirements of Article 27 of the Directive have been fulfilled. According to the Plaintiff, for a provision to justify a restriction on the right to free movement it would have to refer to particular organisations. As it is, the content of the provision constitutes simply general prevention within the meaning of Article 27. As case law has established, expulsion or refusal of entry cannot be justified on grounds of general prevention.[11]

52. The Plaintiff proposes that the fourth question be answered as follows:

> *It is not sufficient grounds for considering public policy and public security to be threatened in the sense of Article 27(1) of Directive 2004/38/EC that an EEA State has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, based on the fact that "organised crime" in the sense of domestic law refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly,*

[11] Reference is made to Case 67/74 *Bonsignore* v *Stadt Köln* [1975] ECR 297, paragraph 7, and *Commission* v *Spain*, cited above, paragraph 59.

deliberately to commit a criminal act, or when a substantial part of the activities involves the commission of such an act. Such legislation is considered as general prevention in the sense of Article 27(2) of the Directive.

The fifth question

53. The Plaintiff asserts that the burden of proof in relation to Article 27 lies with the EEA States. According to case law, a recourse to the concept of public policy and public security presupposes conduct that poses a genuine, imminent and sufficiently serious threat affecting one of the fundamental interests of society.[12] It is for the national courts to determine whether the administrative authorities have discharged the burden of proof in this regard.

54. The Plaintiff proposes that the fifth question be answered as follows:

Article 27(2) of Directive 2004/38/EC should be understood meaning that a premise for the application of measures under Article 27(1) of the Directive against a specific individual is that the EEA State must adduce a probability that the individual in question intends to indulge in activities comprising a certain action or actions, or refraining from a certain action or actions, in order for the individual's conduct to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The Defendant

The first question

55. The Defendant submits that Article 7 EEA leaves the choice of form and method of implementation to the Contracting Parties – whether through primary law or administrative measures – without prejudice to the duty of national courts to interpret national law in conformity with EEA law and in light of the purpose of the EEA rules in accordance with Article 3 EEA.

The second question

56. The Defendant refers to case law regarding the interpretation of Directive 64/221/EEC[13] which must apply in the present case by parity of reasoning. This establishes the area of discretion that the States enjoy in determining the circumstances that justify recourse to public policy and public security, for example regarding the nature

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[12] Reference is made to Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, in particular paragraph 35.

[13] Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ, English Special Edition 1963-1964, p. 117.

of an organisation considered to be socially harmful.[14] EEA law does not impose on the Contracting Parties a uniform scale of values as regards the assessment of conduct which may be considered contrary to public policy,[15] and they retain the freedom to determine the requirements of public policy and public security in accordance with their national needs subject to the requirements of EEA law.[16] According to Article 27(2) of the Directive, this requirement is fulfilled by the existence of a genuine, present and sufficiently serious threat to one of the fundamental interests of society.[17] The Defendant asserts that support for this discretion can be found in the latitude granted to States in the broader context of the fundamental freedoms in determining the requirements for the justifications of public policy and public security.[18] EEA States retain considerable latitude in determining that the conduct in question justifies the application of a restriction despite relevant case law requiring a strict interpretation of derogations from the fundamental freedoms.

57. The Defendant submits further that the concepts of public policy and public security overlap. Criminal activity, including crimes related to drug dependency and organised drug dealing as well as sexual abuse of minors posing a serious threat to fundamental interests of society, may directly threaten the calm and physical security of the population, thus justifying expulsion decisions against long-term residents from other EEA States taken on *imperative* grounds of public security in accordance with Article 28(3) of the Directive.[19] Consequently, according to Iceland, there can be no doubt that it falls within its discretion to determine that the activities of organised motorcycle gangs threaten its population, both in terms of its physical security and calm, and, thus, constitute a threat to a fundamental interest of society. These activities can therefore justify recourse to restrictive measures taken on grounds of public policy and public security.

58. The Defendant notes that in the national proceedings it submitted documents including a Europol report according to which the *Hell's Angels* organisation is considered to be a criminal organisation involved in organised crime activities and that it was focussed on expanding to new territories. The Defendant submits that the authorities

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[14] Reference is made to *Van Duyn*, cited above, paragraph 18.

[15] Reference is made to *Jany and Others*, cited above, paragraph 60.

[16] Reference is made to Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 23, and Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609, paragraph 31.

[17] Reference is made to *Jipa*, cited above, paragraph 23, and *Orfanopoulos and Oliveri*, cited above, paragraph 66.

[18] Reference is made to Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17, and Case C-394/97 *Criminal Proceedings against Sami Heinonen* [1999] ECR I-3599, paragraph 43.

[19] Reference is made to Case C-145/09 *Land Baden-Württemberg* v *Panagiotis Tsakouridis* [2010] ECR I-11979, paragraphs 46-47, Case C-348/96 *Criminal Proceedings against Donatella Calfa* [1999] ECR I-11, paragraph 22, and Case C-348/09 *P.I.* v *Oberbürgermeisterin der Stadt Remscheid*, judgment of 22 May 2012, not yet reported.

of the Nordic countries have formulated a clear strategy of fighting organised crime by motorcycle gangs and that the national commissioners of police work jointly towards this goal. National efforts have included a policy of preventing outlaw motorcycle gangs from establishing a foothold in order to carry out crime. In that regard, it observes that the Icelandic authorities had established that cooperation existed between the Icelandic motorcycle club and the *Hell's Angels* organisation. Various task forces were created to gather intelligence on these activities and to combat the activities of these groupings.

59. The Defendant submits that the increased coordination undertaken by the European Union in combating crimes associated with outlaw motorcycle gangs affects the definition of the concepts of public policy and public security.[20] Due to the reliance of such organisations on cross-border infrastructures and relationships in establishing themselves, those links pose an increased risk to the general population and incite fear and upset.

60. The Defendant considers that, in assessing the threat to public policy and public security posed by groups associated with organised crime, the same criteria must be relevant as those communicated by the Commission in relation to individual cases,[21] that is, the nature of the offence and the damage or harm caused. Consequently, in its view, a measure to refuse entry to a declared member of a certain organisation in circumstances such as those of the present case may fall within the concepts of public policy and public security.

61. The Defendant contends that when organisations pose a threat to the social order, case law allows the active membership of such group to suffice in order to establish personal conduct representing a sufficiently serious threat to the social order,[22] and thus fulfilling the requirement of posing, in addition to the social perturbation of the social order which any infringement of the law involves, a genuine and sufficiently serious threat to a fundamental interest of society.[23] In the case referred, the decision of the competent authority was based not only on the Plaintiff's active membership of the organisation but also on an individual assessment that the visit was connected to the accession by the local association to the organisation in question.

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[20] Reference is made to *Tsakouridis*, cited above, paragraphs 46-47, and Case C-137/09 *Marc Michel Josemans* v *Burgemeester van Maastricht* [2010] ECR I-13019.

[21] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States, COM 2009 313 final ("the 2009 Guidelines"), point 3.2.

[22] Reference is made to *Van Duyn*, cited above, paragraph 17.

[23] Reference is made to *Orfanopoulos and Oliveri*, cited above, and Case C-349/06 *Murat Polat* v *Stadt Rüsselsheim* [2007] ECR I-8167, paragraphs 34-36.

62. The Defendant submits that the answer to the second question should be as follows:

> *Article 27, paragraph 1, of Directive 2004/38/EC should be interpreted as meaning that the Contracting Parties can take measures to restrict the freedom of movement of citizens of EEA States on grounds of public policy and public security based on considerations of protecting the population from harm resulting from criminal activity and organised crime. The Contracting Parties have discretion to determine their policy relating to combating criminal activity and organised crime, subject to the substantive and procedural requirements of the Directive. It is for the referring court to assess, given the circumstances and facts before it, whether the individual's conduct poses a genuine, present, and sufficiently serious threat to a fundamental interest of society. In this assessment, it is sufficient that the individual is an active member of the organisation identified by the authorities to pose a genuine threat to public policy and public security.*

The third question

63. The Defendant submits that, in order to restrict the right to free movement, it is not necessary that an organisation, of which a member is refused entry, is prohibited by national law or otherwise, as long as the State has taken some administrative measures to counteract the activities of that organisation.[24] This is a consequence of the area of discretion that EEA States enjoy in having recourse to public policy, which presupposes only a clear definition of the authorities' standpoint regarding an organisation the activities of which are considered to be socially harmful.[25] The Defendant contends that the criterion is not whether the same measure was adopted in respect of its own nationals, as no authority exists to expel a national,[26] but whether repressive measures or other genuine and effective measures intended to combat the conduct were taken.[27] As Union citizenship does not form part of the EEA Agreement, this requirement must apply in the present case. Consequently, according to the Defendant, consideration must be given to the fact that the authorities have sought to combat the conduct associated with membership of the organisation and that this is an established strategy providing for coercive measures where justified. Measures pursuant to criminal or administrative law may include the limitation or prohibition of gatherings of the association.

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[24] Reference is made to the 2009 Guidelines, point 3.3.

[25] Reference is made to *Van Duyn*, cited above, paragraph 19.

[26] Reference is made to Case C-434/09 *Shirley McCarthy* v *Secretary of State for the Home Department* [2011] ECR I-3375, paragraph 29 and the case law cited.

[27] Reference is made to *Adoui and Cornuaille*, cited above, paragraph 7; *Jani and Others*, cited above, paragraph 61; *Polat*, cited above, paragraphs 37-38; and Case C-100/01 *Ministre de l'Intérieur* v *Olazabal* [2002] ECR I-10981, paragraph 40.

64. The Defendant submits that the answer to the third question should be as follows:

> *It is of no significance whether the EEA State has outlawed the organisation of which the individual in question is a member and/or membership of such an organisation is prohibited in the state.*

The fourth question

65. The Defendant submits that, as follows from its answers to the second and third questions, for the purposes of imposing a restriction on free movement it is not relevant whether the conduct against which measures are taken on grounds of public policy and public security is criminalised. However, the enactment of criminal sanctions against particular conduct can be relevant in assessing whether conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other EEA States. The Defendant submits that the criminalisation of conduct in accordance with international obligations is not primarily effected for purposes of general prevention and refers to its response to the fifth question.

The fifth question

66. The Defendant refers to the ECJ's judgment in *Van Duyn*[28] in support of its contention that active membership in an organisation suffices to establish personal conduct for the purposes of Article 27(2) of the Directive. The present association with an organisation reflects participation in its activities as well as identification with its aims and designs and may thus be considered a voluntary act of the person concerned, and, consequently, as part of his personal conduct. In the present case, the specific risk was posed by the impending accession of the Icelandic motorcycle club to the organisation in question.

67. The Defendant submits that, pursuant to the provisions of Directive 2004/38, citizens of the Union, even long-term residents, may be expelled on the basis of a criminal conviction for a particular criminal activity. Only expulsion which is an automatic consequence of an imposed prison sentence without any individual assessment infringes the requirements of Article 27 of the Directive.[29] Consequently, restrictions on free movement can be imposed if an individual assessment has been undertaken. This assessment may be based on the likelihood or propensity of certain conduct, for example of re-offending.[30] The Defendant submits that a general assessment, based on past conduct and predictions of future conduct, is sufficient to establish a threat resulting from

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[28] Reference is made to *Van Duyn*, cited above, paragraph 17.

[29] Reference is made to *Orfanopoulos and Oliveri*, cited above, and Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-4383.

[30] Reference is made to the 2009 Guidelines.

individual conduct. In the case of active membership of an organisation, that involvement in the organisation establishes the personal conduct. As a consequence, any further assessment of personal conduct, which is for the national court, has to reflect the danger posed by the organisation. In that connection, therefore, in order to take restrictive measures on grounds of public policy and public security, there is no requirement on the public authorities to demonstrate the probability that the individual in question intends to indulge in certain activities.

68. The Defendant submits that, although the Directive does not allow measures taken for the purpose of deterring other foreign nationals from committing the same criminal offence as the person in question,[31] this does not preclude measures adopted to stem the activities of a particular group and with a particular aim, as these measures are specific in nature.

69. The Defendant contends that a refusal of entry – not entailing a ban on returning at a later time – may be in conformity with the principle of proportionality[32], anchored also in general administrative law, if the harm to societal interests posed is grave.

The Government of Norway

The first question

70. The Norwegian Government submits that it results from Article 7 EEA that the Contracting Parties have the choice of form and method of implementation. It follows from case law that it is not always necessary to formally enact the requirements of a directive in a specific and express legal provision in light of the general legal context and the interpretation given to national provisions by the national court.[33]

The second to fifth question

71. The Norwegian Government submits that the remaining questions can be answered together. In essence, these questions seek guidance as to the conditions under which EEA States may restrict the freedom of movement of citizens of EEA States on grounds of public policy and public security in accordance with Article 27 of the Directive.

72. According to the Norwegian Government, it is apparent from the wording of Article 27 of the Directive that "public policy" and "public security" are two distinct and

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[31] Reference is made to *Bonsignore*, cited above, and *Orfanopoulos and Oliveri*, cited above, paragraph 68.

[32] Reference is made to *Jipa*, cited above, paragraph 29.

[33] Reference is made to Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraphs 76 and 84, Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 37, and Case C-452/01 *Ospelt* [2003] ECR I-9743, paragraph 53.

alternative grounds capable of justifying restrictions, a distinction which has legal implications as regards the form they may take.[34] As the definition of public security includes the internal and external security of a Member State,[35] it can be affected by various factors, including threats to the functioning of institutions and essential public services and the survival of the population.[36] The concept of public security therefore includes the fight against organised crime, for example, in connection with dealing in narcotics as part of an organised group.[37]

73. The Norwegian Government contends that the concept of "public policy" pertains more generally to any "genuine and sufficiently serious threat to a fundamental interest of society".[38] Although the scope of this concept must be interpreted strictly and cannot be determined unilaterally by the EEA States without being subject to control by the EEA institutions,[39] it is established case law that the "specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."[40] The Norwegian Government refers to the various legitimate aims that can constitute "fundamental interests of society",[41] including the fight against crime,[42] and which are therefore capable of justifying various kinds of restrictions including restrictions on association with organisations the activities of which are deemed to be contrary to the public good.[43]

74. The Norwegian Government considers the judgment in *Van Duyn* of particular relevance for the interpretation of the relevant provisions, which, although decided on the interpretation of Article 3 of Council Directive 64/221/EEC, must apply to Article 27 of

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[34] Reference is made to *Tsakouridis*, cited above.

[35] Reference is made to Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 17; Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 17; Case C-423/98 *Albore* [2000] ECR I-5965, paragraph 18; and Case C-186/01 *Dory* [2003] ECR I-2479, paragraph 32.

[36] Reference is made to Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraphs 34-35; Case C-70/94 *Werner* [1995] ECR I-3189, paragraph 27; *Albore*, cited above, paragraph 22; and Case C-398/98 *Commission* v *Greece* [2001] ECR I-7915, paragraph 29.

[37] Reference is made to *Tsakouridis*, cited above, paragraphs 45-47.

[38] Reference is made to *Bouchereau*, cited above, paragraph 35.

[39] Reference is made to *Van Duyn*, cited above, paragraph 18.

[40] Reference is made to *Omega*, cited above, paragraph 31.

[41] Reference is made to *Omega*, cited above, paragraphs 32-35; *Église de scientologie*, cited above, paragraphs 4 and 17-20; Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraphs 50-53; Case E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, paragraph 59; Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13963, paragraphs 88-89; *Van Duyn*, cited above, paragraphs 18-23; and *Josemans*, cited above, paragraphs 62 and 65-66.

[42] Reference is made to *Bouchereau*, cited above, paragraphs 27-29.

[43] Reference is made to *Van Duyn*; *Église de scientologie*; *Omega*; and *Josemans*, all cited above.

Directive 2004/38 by parity of reasoning.[44] Consequently, according to the Norwegian Government, it is clear that the "present association, which reflects participation in the activities of the body or of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct"[45] within the meaning of Article 3 of Directive 64/221 and, by parity of reasoning, of Article 27(2) of Directive 2004/38. Second, Member States are not required to outlaw the activities of an organisation in order to restrict the movement of its members, provided that they have taken administrative measures to counteract these activities.[46] Third, a refusal of entry to a citizen of another EEA State is not precluded simply because similar restrictions were not placed on nationals.[47]

75. The Norwegian Government submits that the answer to questions two to five should be as follows:

> *Article 27 of the Directive is to be interpreted as meaning that an EEA State, in imposing restrictions on the freedom of movement of citizens of EEA States justified on grounds of public policy and public security, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the State considers socially harmful but which are not unlawful in that State, even though the State does not place a similar restriction upon its own nationals"*

The EFTA Surveillance Authority

The first question

76. ESA submits that, pursuant to Article 7 EEA, Contracting Parties have the choice of form and method of implementation when making the provisions of Directive 2004/38/EC part of their internal legal order. In doing so, they must take account of the principle of effectiveness and must ensure that the objectives pursued by the directive are fulfilled.[48]

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[44] Reference is made to Case C-434/10 *Aladzhov*, judgment of 17 November 2011, not yet reported, paragraph 32, Case C-430/10 *Gaydarov*, judgment of 17 November 2011, not yet reported, paragraph 31; and *McCarthy*, cited above, paragraph 29.

[45] Reference is made to *Van Duyn*, cited above, paragraph 17.

[46] Ibid., paragraph 19.

[47] Reference is made to *Van Duyn*, cited above, paragraph 23, and *Polat*, cited above, paragraph 38.

[48] Reference is made to Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraphs 37-39, and Case C-104/10 *Patrick Kelley* v *National University of Ireland*, judgment of 21 July 2011, not yet reported, paragraph 35.

The second question

77. ESA refers to Commission Guidelines[49] and to case law[50] in support of its view that the concept of public security includes both internal and external security, whereas public policy is generally interpreted as covering the prevention of the disturbance of social order, and, in addition, that EEA States enjoy a certain margin of appreciation in determining the requirements of public policy and public security. It notes further that the denial of entry giving rise to the case before the national court was based on item (c) of the first paragraph of Article 41 in conjunction with Article 42 of the Foreign Nationals Act, which allows for this restriction if it is considered necessary in view of public order or safety and if the individual concerned exhibits conduct or is likely to engage in conduct that involves a substantial and sufficiently serious threat to the fundamental attitudes of society. ESA submits that as "present association, which reflects participation in the activities of the organisation as well as identification with its aims and designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct",[51] membership of an organisation assumed to practise activities considered harmful to society may be taken into account when determining the personal conduct of the person involved.

78. ESA considers that, in the case before the national court, the decision was taken by the Immigration Office on the basis of information provided by police including an open danger assessment of the date of entry. This action was part of an established and consistent practice of the National Commissioner of Icelandic Police. ESA observes that the organisation in question is considered by authorities in other States to constitute a criminal organisation. At the time the assessment was established, information was obtained showing that the club whose members the individual concerned intended to meet was intending to accede to the said organisation. Moreover, the general practice in accession procedures was that the acceding association would adopt the practices of the one to which it acceded, and to which the individual concerned belonged, likely to lead to an increase in organised crime. ESA contends, therefore, that, in light of the said margin of appreciation, Iceland was entitled to consider that the public policy and public security requirements were fulfilled.

79. ESA submits that the answer to the second question should be as follows:

> *Paragraph 1 of Article 27 of Directive 2004/38/EC can be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA State consider, on the basis of a danger assessment, that an organisation to which the*

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[49] Reference is made to the 2009 Guidelines, p. 10.

[50] Reference is made to *Van Duyn*, cited above, paragraph 18; *Bouchereau*, cited above, paragraph 34; *Olazabal*, cited above, paragraph 44; and the Opinion of Advocate General Bot in *Tsakouridis*, cited above, points 69-70.

[51] Reference is made to *Van Duyn*, cited above, paragraph 17.

individual in question belongs, is connected with organised crime and the assessment is based on the view that where such organisations have managed to establish themselves, increased and organised crime has followed, is sufficient to consider a citizen another EEA State to constitute a threat to public order and public security in the State in question.

The third question

80. ESA submits that it follows from case law that, in order to restrict the freedom of movement of EEA nationals pursuant to Article 27 of the Directive, national authorities are not obliged to outlaw the activities of an organisation as long as administrative measures have been taken to counteract its activities.[52] This follows from the margin of appreciation that national authorities enjoy in the choice of measures taken to counteract the activities of criminal organisations. ESA contends that national authorities are best-placed to determine the most effective measures and also to assess their potentially damaging effects. Furthermore, to restrict the freedom of movement of citizens of other EEA States without placing similar restrictions on nationals does not infringe the Directive as this reflects international law practice which precludes States from refusing their own nationals the right of entry or residence.[53]

81. ESA submits that the answer to the third question should be that:

It is not of significance whether the EEA State has outlawed the organisation of which the individual in question is a member or if the membership of such an organisation is prohibited in the state.

The fourth question

82. ESA notes that the Icelandic authorities did not base their decision to deny entry on the provision of national law specified in the question. None the less, a national provision such as that at issue can constitute proof of an established practice to counteract organised crime. ESA submits, however, that a general reference to provisions of national law defining organised crime as punishable cannot, as such, constitute sufficient grounds for denying entry. In accordance with Article 27(2) of the Directive, national authorities are obliged to undertake a specific assessment as to whether the personal conduct of the individual concerned can be considered to represent a threat.

83. ESA submits that the answer to the fourth question should be as follows:

The fact that an EEA State has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the

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[52] Reference is made to *Van Duyn*, cited above, paragraph 19, and the 2009 Guidelines, pp. 11-12.

[53] Reference is made to *Van Duyn*, cited above, paragraphs 20-23, and *Olazabal*, cited above, paragraphs 40-42.

commission of which is part of the activities of a criminal organisation, cannot be considered as sufficient grounds for considering public order and public security to be threatened in the sense of paragraph 1 of Article 27 of Directive 2004/38/EC.

The fifth question

84. ESA contends that in order to demonstrate that personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it suffices that the individual in question is a member of an organisation that is assumed to practise activities that are considered to be harmful to society, as the person in question has by his participation identified with the aims of the organisation in question.[54] In this respect, the fact that an individual has a clean criminal record does not preclude the national authorities from concluding that he represents a threat.

85. ESA submits that the answer to the fifth question should be as follows:

In order to consider an individual's conduct to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in accordance with paragraph 2 of Article 27 of Directive 2004/38/EC, EEA States may take into consideration facts such as that the individual is a member of an organisation that is connected with organised crime.

The Commission

The first question

86. The Commission submits that it is apparent from Article 7 EEA that Contracting Parties have the choice of form and method of implementation when transposing a directive, subject to their obligation to ensure that national law faithfully enacts the terms of the directive and that provision is made in national law to ensure that, in the event of conflict between implemented EEA rules and other statutory provisions, the EEA rules prevail.[55]

The second to fifth question

87. The Commission submits that the remaining questions can be answered together. In essence, these questions seek guidance on the interpretation of Article 27(1) and (2) of the Directive. Guidance is especially sought on the question whether mere membership of an organisation associated with organised crime which in itself is regarded as representing a threat to public policy/and or public security in the host State can justify

[54] Reference is made to *Van Duyn*, cited above, paragraph 17.

[55] Reference is made to Protocol 35 on the implementation of EEA rules.

the denial of entry to a citizen of another EEA State even if the host State has not prohibited membership of the organisation in question.

88. The Commission refers to its 2009 Communication[56] in which it took an official position on the matter raised in the present case.

89. In this context, the Commission notes that the Plaintiff has been denied entry and was not expelled. As regards expulsion, it observes that, as stated in recital 23 in the preamble to the Directive, this is limited by the principle of proportionality and account must be taken of the degree of integration. Conversely, and notwithstanding the wording of Article 27 of the Directive, if a person is not integrated in the host State, the authorities of that State have a wider margin of appreciation to refuse entry than in the case of expulsion.

90. The Commission considers the judgment in *Van Duyn*[57] of utmost importance although it was decided in the context of Directive 64/221. First, it is of relevance that "present association, which reflects participation in the activities of the organisation as well as identification with its aims and designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct"[58] within the meaning of Article 3 of Directive 64/221 and, by parity of reasoning, of Article 27(2) of Directive 2004/38.[59] Second, EEA law does not require EEA States to outlaw an organisation before it may restrict the free movement of its members that are citizens of other EEA States and before the public policy proviso can be invoked. However, the authorities of that State must take effective measures against that organisation and the threat it and its members represent.[60] Third, it stresses the finding in *Van Duyn* that a refusal on grounds of public policy to enter the territory of the host State and to reside and work there is not precluded because the host State did not place such a restriction on its own nationals.[61] The Commission adds, however, that recourse to the public policy exception may not be used to permit covert discrimination.[62]

91. The Commission notes that it appears that the Icelandic authorities regard organised motorcycle gangs as a considerable threat and have consistently taken measures against this phenomenon without banning membership as such. There appears

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56 Reference is made to the 2009 Guidelines, p. 10 et seq.

57 Reference is made to *Van Duyn*, cited above.

58 Ibid., paragraph 17.

59 Reference is made to the 2009 Guidelines, p. 11.

60 Reference is made to *Van Duyn*, cited above, paragraph 19, and the 2009 Guidelines, pp. 10-12.

61 Reference is made to *Van Duyn*, cited above, paragraphs 20-23.

62 Reference is made to *Adoui and Cornuaille*, cited above, paragraph 8, *Jany and Others*, cited above, and *Olazabal*, cited above, paragraph 42.

to be a regular practice of denying entry to foreign members of the *Hell's Angels* motorcycle clubs. The Commission submits that, *a priori*, there appear to be adequate grounds to allow the national authorities to deny entry to a person in the position of the Plaintiff.

92. As regards the concern of the Supreme Court that the criminalisation of activities as a member of an organisation involved in organised crime could constitute a reliance on considerations of general prevention, the Commission submits that measures adopted on grounds of public policy cannot be justified on grounds extraneous to the individual case. Departure from the rules concerning free movement must be strictly construed as exceptions, depending solely on the personal conduct of the individual affected.[63] The purpose of deterring other nationals of an EEA State cannot justify a restriction.[64] In the Commission's view, the prohibition on taking measures of a general preventative nature does not exclude the possibility for authorities of an EEA State to act pre-emptively to stop a threat from materialising, if they do so on reasonable grounds and in accordance with the principle of proportionality. In this context, the Commission notes that the arrival of the applicant in Iceland was thought to be linked to the preparation for full membership of the association, which would instigate the spread of organised crime.

93. The Commission asserts that in comparison with the situation in *Van Duyn*,[65] in which the applicant was only intending to carry out low-level tasks for the Church of Scientology, which was not associated with organised crime albeit considered undesirable, in the present case, the Plaintiff is thought to play a leading role in the activities of an association presumed to be connected to organised crime.

94. As regards the question of the Supreme Court on the necessity for EEA States considering restrictions to adduce a probability that the individual intends to engage in activities comprising a certain action or actions to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the Commission underlines the role of the procedural safeguards contained in the Directive, in particular Article 31. It submits that this guarantee of judicial redress procedures provides for the possibility of a review in court within the procedural autonomy of the State concerned, subject to compliance with the principles of equivalence and effectiveness.[66] It is a matter for the national court to determine whether the administrative authorities have discharged the burden of showing that sufficient evidence exists to entitle them to come to the conclusion that the applicant was likely to engage in such activities. It must also determine whether the decision taken complies with the principle of proportionality in that it must be appropriate for securing the

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63 Reference is made to *Bonsignore*, cited above, paragraphs 5-7.

64 Reference is made to *Orfanopoulos and Oliveri*, cited above, paragraph 65.

65 Reference is made to *Van Duyn*, cited above.

66 Reference is made to Case C-286/06 *Impact* [2008] ECR I-2483.

attainment of the objective which it pursues and must not go beyond what is necessary to achieve it.[67]

95. The Commission submits that the answer to questions two to five should be as follows:

> *On a proper construction of Article 27 of Directive 2004/38, membership of an organisation may be taken into account as an element in assessing the personal conduct of the individual where he participates in the organisation's activities and identifies with its aims or designs. Recourse to that provision does not require that EEA States criminalise or ban the activities of that organisation, as long as effective measures to counteract the activities of that organisation are in place. Nevertheless, since that provision precludes the adoption of measures on general preventive grounds, such measures must be based on the actual or likely conduct of the person affected by the measure and cannot be justified merely on grounds of general deterrence unrelated to the circumstances of the case.*

Carl Baudenbacher
Judge-Rapporteur

[67] Reference is made to *Olazabal*, cited above, paragraphs 43 and 44.